No. 89-899

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

LANTECH, INC., - - - - - Petitioner,

versus

KAUFMAN COMPANY OF OHIO, INC., - - - - - - Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITIONER'S REPLY BRIEF

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December 29, 1989

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Kaufman does not dispute that:

1. Conflicts in material findings of fact must be resolved before a court of appeals may decide issues presented on appeal;
2. When one of two sets of conflicting findings is final and preclusive, that set must prevail on appeal and the decision of a court of appeals must conform to those findings; and
3. The Federal Circuit affirmed the District Court's judgment even though it was based upon challenged findings which conflict with binding, preclusive findings from another unappealed portion of the District Court's judgment.

Nor does Kaufman deny that:

4. The Federal Circuit's decision conflicts with the decision of this Court in *Graham* v. *John Deere Co.*, 383

U.S. 1 (1966) by changing the test for obviousness under 35 U.S.C. § 103; and

5. The Federal Circuit's obviousness decision creates confusion in this central area of the patent law by arbitrarily failing to credit undisputed objective evidence of nonobviousness.

Kaufman argues only that this case "does not have precedential value [and] does [not] involve an issue of public interest" (Brief in Opp., p. 2), because the Federal Circuit's opinion has not been designated for publication.

A court of appeals cannot shield its actions from the scrutiny of the Court by simply writing skeletal opinions ignoring crucial issues and then designating the opinions as not for publication. Judge Bissell's decision not to publish the Federal Circuit's opinion is consistent with a dissenter's desire not to see bad jurisprudence made into bad precedent.

This Court has been given no reason not to take appropriate supervisory action to set both the Federal Circuit and Lantech's enforcement of its patent back on course.

Respectfully submitted,

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